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IN THE

Supreme Court of the United States

October Term, 1909.

AMERICAN LAND COMPANY
(a Corporation),
Complainant and Appellant,

vs.

LOUIS ZEISS,
Defendant and Appellee.

Brief of Amicus Curiae on Motion to Advance the Cause for Hearing or to Dismiss the Certificate.

GARRET W. McENERNEY,
Amicus Curiae.

Filed this.....day of March, 1910.
JAMES H. McKENNEY, Clerk

By.....Deputy Clerk.

THE JAMES H. BARRY CO.,
1122-1124 MISSION ST.

In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1909.

AMERICAN LAND COMPANY,
A CORPORATION,
Complainant and Appellant,

vs.

LOUIS ZEISS,
Defendant and Appellee.

No. 473.

BRIEF OF AMICUS CURIAE ON MOTION TO ADVANCE THE CAUSE FOR HEARING OR TO DISMISS THE CERTIFICATE.

The appellant has filed herein a motion that the cause be advanced for hearing or (in the alternative) that the certificate of the Circuit Court of Appeals be dismissed.

In the brief which accompanies the motion, it is

urged that the cause is of such nature and importance that an early and authoritative settlement of the questions presented is vital. At the same time appellant argues that this Court for various reasons should remand the case to the Circuit Court of Appeals for a determination which it is admitted will not be final, and from which an appeal will lie to this Court. The importance of the case makes it proper to present to the Court a short reply to the suggestions contained in the brief of appellant.

The Statute of California here assailed was passed at a special session of the Legislature convened shortly after the earthquake and fire in San Francisco in April, 1906. The public records, and, in most cases, all muniments of title in the hands of private owners, were destroyed by that catastrophe, with the result that every piece of real property in San Francisco was deprived of record title, and there existed no method of establishing such title. Nearly four years have elapsed since its enactment, during which this statute has been and is to-day the only source of record title to land in the City and County of San Francisco.

More than twenty thousand suits to establish title have been brought under its provisions, and most of these proceedings have passed to final judgment. Record title to probably sixty thousand parcels of land in San Francisco has been restored and

established by proceedings under the Act. Its validity has been upheld by the Supreme Court of the State, and titles established under its provisions have since its enactment been accepted as valid and as the basis of practically all transactions involving the purchase or sale of real property. The proceedings already commenced involve land which constitutes from 75 to 80 per cent of the entire area of the City and County, and which represents in value between 80 and 90 per cent of the entire assessed valuation of real property in the County.

In view of these facts, it is of obvious importance that any decision in this case shall be by this Court, and settle once for all the validity of the Act.

On the other hand, it is no way essential or even urgent that the present case be heard and decided at this term. By the terms of the Act, all proceedings must be commenced within the present year (i. e., before January 1, 1911). Most of the persons who will avail themselves of its provisions have already prosecuted their proceedings to judgment. Many of the questions presented by this case can not arise except in the comparatively few proceedings instituted prior to March 23, 1907, for since that date an Act, supplementary to the one here involved, has made provision by which every claimant to real property in San Francisco is assured of actual notice of any proceeding affecting such land, by merely recording a notice of his claim of ownership.

These considerations are presented only to show that the case is one which must eventually be determined here, and which should be so determined without the necessity and delay of further proceedings in a lower Court, whose judgment can not be final.

Whatever may be the opinion of the Court as to the technical propriety of the certificate of the Court of Appeals, this Court has undoubtedly the power (under Section 6 of the Circuit Court of Appeals Act of 1891) to require the whole record and cause to be sent up for its consideration. And while we believe that the certificate here attacked is in all respects proper, we submit and shall hereinafter urge that regardless of this question the case should be retained by this Court and be by it finally determined.

We pass now to the grounds urged in the brief of appellant for the dismissal of the certificate.

I.

The first point made in appellant's brief (pages 3 to 8) is that the judgment of the Circuit Court of Appeals in this case would not be final, and that it is therefore without power to certify any question to this Court for decision.

Without entering into a discussion of the various propositions urged in this connection (most of which seem to be wholly immaterial) the point may be disposed of upon the ground that the power of the

Circuit Court of Appeals to certify questions to this Court is not limited to cases in which its judgment is final.

By the law of its creation (Section 6, Act March 3, 1891, ch. 517, 26 Stat. L., 826), the Circuit Court of Appeals is given appellate jurisdiction in a variety of cases, in certain classes of which its judgment is final. The Act then continues

> "excepting that in *every such subject within its appellate jurisdiction* the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that Court for its proper decision."

This power exists in all cases within the jurisdiction of the Court.

> *"In every case within its appellate jurisdiction,* the Circuit Court of Appeals may certify to this Court any questions or propositions of law in respect of which it desires instruction, and this Court may then require the whole record and cause to be sent up."
>
> *Lau Ow Bew* vs. *United States,* 144 U. S., 47, 58.

In *American Sugar Refining Co.* vs. *New Orleans,* 181 U. S., 277, 281, Mr. Chief Justice Fuller, delivering the opinion of the Court, said:

> "If plaintiff, by proper pleading, places the jurisdiction of the Circuit Court on diverse citizenship, and also on grounds independent of that —a question expressly reserved is *Colorado Cent. Consol. Min. Co.* vs. *Turck,* 150 U. S., 138, 37 L. Ed., 1030, 14 Sup. Ct. Rep., 35—and the case is taken to the Court of Appeals, propositions as to the latter grounds may be certified; or, if that course is not pursued and the case goes to judgment (and the power to certify assumes the power to decide), an appeal or writ of error would lie under the last clause of Section 6, because the jurisdiction would not depend solely on diverse citizenship."

This language was quoted with approval in the later case of *Spreckels Sugar Refining Co* vs. *McClain,* 192 U. S., 397.

In this connection see also *Hughes' Federal Procedure,* page 469.

II.

The next proposition suggested in the brief for appellant is that this Court is without jurisdiction because the certificate does not show that instruction is desired for the proper decision of the questions certified.

Two cases are cited by appellant. In both there was involved the propriety of a certification by the Court of Appeals *after it had actually decided the*

case. In the first of the cases (*Columbus Watch Co.* vs. *Robbins,* 148 U. S., 266), the certificate was dismissed, as pointed out by this Court in *Smith* vs. *Vulcan Iron Works,* 165 U. S., 518, 523,

> "because no question of law was distinctly certified, and *because the Circuit Court of Appeals had decided the case before granting the certificate.*"

In the other case (*German Ins. Co.* vs. *Hearne,* 118 Fed., 134), after a judgment had been entered in the Circuit Court of Appeals, the defeated party applied to it to certify the whole case to the Supreme Court. The Court denied the application, saying that it could not

> "truthfully declare that the question or proposition of law that underlies the judgments recently entered in this Court, but is believed by the defendant in error to have been wrongly decided, is a question or proposition concerning which we desire the instruction of the Supreme Court in order that we may properly determine it. The Circuit Court of Appeals was unanimous in its opinion, and none of the judges who then constituted the Court considered then, or now considers, that the point in controversy was so doubtful that instruction thereon should be asked from the ultimate tribunal. Of course, our conclusion may have been erroneous, but, so long as we believe in its soundness, we can not properly give the certificate required by the Act."

In the case at bar the Circuit Court of Appeals has made no decision. Instead it has, in strict conformity with the Act, certified certain questions, the certificate stating that the "Court desires the instruc-" tion of the Supreme Court upon the question which " it hereby certifies for decision." The language of the certificate follows substantially the language of the Act providing for the certification of such questions.

III.

The last of the points argued in the brief of appellant is that the certificate in effect presents the whole case for decision.

The certificate presents two questions of law:

(1) Whether the statute here attacked (Stats. Cal., 1906, page 78) is violative of the Fourteenth Amendment; and

(2) Whether by virtue of the decree rendered by the Superior Court of the City and County of San Francisco (set out in the bill of complaint), the appellant has been deprived of its property without due process of law.

The first of these questions is addressed to a contention of the appellant that the proceeding provided for by the Act is unconstitutional and entirely outside the realm of judicial power, because the plaintiff's pleading may not disclose an existing controversy.

Upon this ground, it is argued that even as to a person having actual notice of the proceeding it is void, since no "notice, however reasonable in other respects ". . . give a court jurisdiction to conclude per- "sons . . . against whom nothing is alleged," and who are sued merely as unknown owners.

The second question is addressed to the proposition that the constructive notice afforded by the Act did not amount to due process of law as against the appellant, who did not receive actual notice.

Each of the propositions certified is a pure question of law, unmixed with any question of fact. If either of the questions is properly certifiable that question will be answered by this Court without respect to the propriety of the other.

McHenry vs. *Alvord,* 168 U. S., 651, 658.

The cases in which this Court has refused to answer questions certified by inferior courts upon the ground that such questions presented the whole case are, broadly speaking, of two classes. In the first class, exemplified by certificates of division of the circuit courts under the old statute providing for such certificates (see, for instance, *Jewell* vs. *Knight,* 123 U. S., 426) or, at present by such certificates in cases involving rulings of the Interstate Commerce Commission (see, for instance, *Baltimore & Ohio Railway Company* vs. *Interstate Commerce Commission,* 30 Sup. Ct. Rep., 86), a certificate bringing up the

whole case for decision, or presenting mixed questions of fact and law, was and is held improper, as practically converting the Supreme Court into a court of original jurisdiction in cases where the Constitution does not vest it with such jurisdiction.

In the second class, the questions certified were mixed questions of fact and law, or were of such a character that an answer to them imposed upon the Court the labor of determining "the whole case and " all questions of law which may be lurking in the " record."

See, for instance, *Cross* vs. *Evans,* 167 U. S., 57, 63, 64.

In the case at bar, the questions certified are certain and definite propositions of law, and it is difficult to see how any question could be framed by the Court of Appeals which would more tersely present the single question of the alleged conflict between the Act here assailed and the Fourteenth Amendment to the Federal Constitution.

We respectfully submit that the certificate of the Court of Appeals in the case at bar is proper, and that the objections of appellant to it are without force. In any event, as already said, the case is one involving questions which must in the end be determined by this Court and which should be determined by it without the necessity of an uninstructed decision by the Court of Appeals and a later appeal to this tribunal.

This Court has power, under Section 6 of the Act creating the Court of Appeals, either to answer the questions certified,

> "or it may require that the whole record and cause may be sent up to it for its consideration and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

We respectfully submit that the course indicated should be followed in the present case, and that this Court, if not satisfied that the present certificate properly presents the questions involved in the cause, should order the entire record sent up and should "decide the whole matter in controversy."

In order that the Court may have at hand means of investigating the present state of the authorities and the statutory law in this and allied cases, we have filed with this brief copies

(a) of the brief submitted to the Circuit Court of Appeals by *Amici Curiae* in support of the validity of the act here attacked, and

(b) of compilations of the California, Federal and Illinois Burnt Record and Land Title Acts (prepared by the Secretary of State of California).

Respectfully submitted.

GARRET W. McENERNEY,

Amicus Curiae.

Dated, San Francisco, March, 1910.